

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CHRISTLE LYNN HAYES,

1:13-cv-00995-BR

Plaintiff,

OPINION AND ORDER

v.

CAROLYN W. COLVIN, Acting
Commissioner, Social Security
Administration,¹

Defendant.

MARLENE R. YESQUEN
Black, Chapman, Webber & Stevens
221 Stewart Avenue, #209
Medford, OR 97501
(541) 722-9850

Attorneys for Plaintiff

¹ Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin should be substituted for Michael J. Astrue as Defendant in this case. No further action need be taken to continue this case by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405.

S. AMANDA MARSHALL

United States Attorney

ADRIAN L. BROWN

Assistant United States Attorney

1000 S.W. Third Avenue, Suite 600

Portland, OR 97204-2902

(503) 727-1003

DAVID MORADO

Regional Chief Counsel

LARS J. NELSON

Special Assistant United States Attorney

Social Security Administration

701 Fifth Avenue, Suite 2900, M/S 221A

Seattle, WA 98104

(206) 615-2909

Attorneys for Defendant

BROWN, Judge.

Plaintiff Cristle Lynn Hayes seeks judicial review of a final decision of the Commissioner of the Social Security Administration (SSA) in which she denied Plaintiff's application for Supplemental Security Income (SSI) payments under Title XVI of the Social Security Act. This Court has jurisdiction to review the Commissioner's decision pursuant to 42 U.S.C. § 405(g).

For the reasons that follow, the Court **AFFIRMS** the Commissioner's final decision and **DISMISSES** this matter.

ADMINISTRATIVE HISTORY

Plaintiff filed her application for SSI on November 16, 2009. Tr. 154.² The application was denied initially and on reconsideration. An Administrative Law Judge (ALJ) held a video hearing on May 1, 2012. Tr. 22. At the hearing Plaintiff was represented by an attorney. Plaintiff and a vocational expert (VE) testified at the hearing. Tr. 22.

The ALJ issued a decision on May 24, 2012, in which he found Plaintiff is not entitled to benefits. Tr. 30. That decision became the final decision of the Commissioner on April 16, 2013, when the Appeals Council denied Plaintiff's request for review. Tr. 1.

BACKGROUND

Plaintiff was born on October 24, 1962, and was 49 years old at the time of the hearing. Tr. 154. Plaintiff completed high school and two years of college. Tr. 42. Plaintiff has past relevant work experience as a fast-food worker and medical transcriber. Tr. 61.

Plaintiff alleges disability since October 29, 2009,³ due to

² Citations to the official transcript of record filed by the Commissioner on October 22, 2013, are referred to as "Tr."

³ Plaintiff alleged an onset date of June 7, 2007, in her application, but at the hearing she amended her alleged onset date to October 29, 2009. Tr. 41.

fibromyalgia, sciatica, neuropathy, bursitis, spondylosis, depression, high-blood pressure, asthma, and "right leg problems." Tr. 41, 177.

Except when noted, Plaintiff does not challenge the ALJ's summary of the medical evidence. After carefully reviewing the medical records, this Court adopts the ALJ's summary of the medical evidence. See Tr. 24-30.

STANDARDS

The initial burden of proof rests on the claimant to establish disability. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012). To meet this burden, a claimant must demonstrate her inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The ALJ must develop the record when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence. *McLeod v. Astrue*, 640 F.3d 881, 885 (9th Cir. 2011) (quoting *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001)).

The district court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record as a whole. 42

U.S.C. § 405(g). See also *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Molina*, 674 F.3d. at 1110-11 (quoting *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009)). It is more than a "mere scintilla" of evidence but less than a preponderance. *Id.* (citing *Valentine*, 574 F.3d at 690).

The ALJ is responsible for determining credibility, resolving conflicts in the medical evidence, and resolving ambiguities. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). The court must weigh all of the evidence whether it supports or detracts from the Commissioner's decision. *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008). Even when the evidence is susceptible to more than one rational interpretation, the court must uphold the Commissioner's findings if they are supported by inferences reasonably drawn from the record. *Ludwig v. Astrue*, 681 F.3d 1047, 1051 (9th Cir. 2012). The court may not substitute its judgment for that of the Commissioner. *Widmark v. Barnhart*, 454 F.3d 1063, 1070 (9th Cir. 2006).

DISABILITY ANALYSIS

I. The Regulatory Sequential Evaluation

The Commissioner has developed a five-step sequential inquiry to determine whether a claimant is disabled within the meaning of the Act. *Keyser v. Comm'r of Soc. Sec. Admin.*, 648 F.3d 721, 724 (9th Cir. 2011). See also *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007); 20 C.F.R. § 416.920. Each step is potentially dispositive.

At Step One the claimant is not disabled if the Commissioner determines the claimant is engaged in substantial gainful activity. 20 C.F.R. § 416.920(a)(4)(I). See also *Keyser*, 648 F.3d at 724.

At Step Two the claimant is not disabled if the Commissioner determines the claimant does not have any medically severe impairment or combination of impairments. 20 C.F.R. § 416.920(a)(4)(ii). See also *Keyser*, 648 F.3d at 724.

At Step Three the claimant is disabled if the Commissioner determines the claimant's impairments meet or equal one of the listed impairments that the Commissioner acknowledges are so severe as to preclude substantial gainful activity. 20 C.F.R. § 416.920(a)(4)(iii). See also *Keyser*, 648 F.3d at 724. The criteria for the listed impairments, known as Listings, are enumerated in 20 C.F.R. part 404, subpart P, appendix 1 (Listed Impairments).

If the Commissioner proceeds beyond Step Three, she must assess the claimant's residual functional capacity (RFC). The claimant's RFC is an assessment of the sustained, work-related physical and mental activities the claimant can still do on a regular and continuing basis despite her limitations. 20 C.F.R. § 416.920(e). See also Social Security Ruling (SSR) 96-8p. "A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent schedule." SSR 96-8p, at *1. In other words, the Social Security Act does not require complete incapacity to be disabled. *Taylor v. Comm'r of Soc. Sec. Admin.*, 659 F.3d 1228, 1234-35 (9th Cir. 2011) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). The assessment of a claimant's RFC is at the heart of Steps Four and Five of the sequential analysis when the ALJ is determining whether a claimant can still work despite severe medical impairments. An improper evaluation of the claimant's ability to perform specific work-related functions "could make the difference between a finding of 'disabled' and 'not disabled.'" SSR 96-8p, at *4.

At Step Four the claimant is not disabled if the Commissioner determines the claimant retains the RFC to perform work she has done in the past. 20 C.F.R. § 416.920(a)(4)(iv). See also *Keyser*, 648 F.3d at 724.

If the Commissioner reaches Step Five, she must determine whether the claimant is able to do any other work that exists in

the national economy. 20 C.F.R. § 416.920(a)(4)(v). See also *Keyser*, 648 F.3d at 724-25. Here the burden shifts to the Commissioner to show a significant number of jobs exist in the national economy that the claimant can perform. *Lockwood v. Comm'r Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). The Commissioner may satisfy this burden through the testimony of a VE or by reference to the Medical-Vocational Guidelines set forth in the regulations at 20 C.F.R. part 404, subpart P, appendix 2. If the Commissioner meets this burden, the claimant is not disabled. 20 C.F.R. § 416.920(g)(1).

ALJ'S FINDINGS

At Step One the ALJ found Plaintiff has not engaged in substantial gainful activity since October 29, 2009, her alleged onset date. Tr. 24.

At Step Two the ALJ found Plaintiff has the severe impairments of nerve sheath tumor of the lumbosacral spine with post-operative scarring, degenerative disc disease of the lumbosacral spine, degenerative disc disease of the cervical spine, hypertension, and asthma.⁴ Tr. 24.

At Step Three the ALJ found Plaintiff's impairments do not

⁴ The Court notes the ALJ based his findings as to these impairments on the medical diagnoses of Plaintiff that appear in the record rather than statements in Plaintiff's applications. See Tr. 24, 177.

meet or equal the criteria for any impairment in the Listing of Impairments. Tr. 26. Based on Plaintiff's application dated July 9, 2010, the ALJ found Plaintiff had the RFC to perform a full range of sedentary work. The ALJ also found Plaintiff has had the RFC since August 1, 2010, to perform light work except she only "is able to lift and/or carry 20 pounds occasionally and 10 pounds frequently, stand and/or walk about six hours in an eight-hour day, and sit about six hours in an eight-hour day, can no more than occasionally climb, stoop, kneel, crouch, or crawl, and can frequently balance." Tr. 26-27.

At Step Four the ALJ concluded Plaintiff is capable of performing her past relevant work as a medical transcriber and a fast-food worker. Tr. 30. Accordingly, the ALJ found Plaintiff is not disabled and, therefore, is not entitled to benefits.

DISCUSSION

Plaintiff contends the ALJ erred by (1) improperly discrediting Plaintiff's testimony; (2) improperly rejecting the opinions of treating physician Richard Julyan, M.D.; and (3) posing an incomplete hypothetical to the VE.

I. Plaintiff's Testimony

Plaintiff alleges the ALJ erred by failing to give clear and convincing reasons for rejecting her testimony as to the intensity, persistence, and limiting effects of her symptoms.

In *Cotton v. Bowen* the Ninth Circuit established two requirements for a claimant to present credible symptom testimony: The claimant must produce objective medical evidence of an impairment or impairments, and she must show the impairment or combination of impairments could reasonably be expected to produce some degree of symptom. *Cotton*, 799 F.2d 1403, 1407 (9th Cir. 1986). The claimant, however, need not produce objective medical evidence of the actual symptoms or their severity. *Smolen*, 80 F.3d at 1284.

If the claimant satisfies the above test and there is not any affirmative evidence of malingering, the ALJ can reject the claimant's pain testimony only if he provides clear and convincing reasons for doing so. *Parra v. Astrue*, 481 F.3d at 750 (citing *Lester*, 81 F.3d at 834. General assertions that the claimant's testimony is not credible are insufficient. *Id.* The ALJ must identify "what testimony is not credible and what evidence undermines the claimant's complaints." *Id.* (quoting *Lester*, 81 F.3d at 834).

At the hearing Plaintiff testified some of her pain symptoms went away after her back surgery in May 2011, but she is still unable to stand in one spot very long and experiences pain if she walks more than a block. Tr. 47. Plaintiff stated she was diagnosed with fibromyalgia "years ago," and it has spread to both legs. Tr. 48. Plaintiff complained of numbness, pain, and

swelling in her hands and stated she drops things often. Tr. 49. Plaintiff testified her daily activities include watching television, reading, and making simple meals, but she needs assistance with tasks like vacuuming and cleaning. Tr. 53-54.

The ALJ found Plaintiff's medically determinable impairments could reasonably be expected to cause some of her alleged symptoms, but her statements concerning the intensity, persistence, and limiting effects of her symptoms were not credible to the extent that they were inconsistent with Plaintiff's RFC. Tr. 27. The ALJ found Plaintiff's "allegations of continuing, significant difficulty with standing, walking, and sitting post-surgically are contradicted by the objective medical evidence and her relatively routine treatment history post surgery." Tr. 29. The ALJ also found Plaintiff's testimony regarding "such extreme symptoms" was "flatly contradict [ed]" by the post-operative progress notes of treating physician Thomas J. Altstadt, M.D., in which he noted Plaintiff was "doing well" and was "quite happy with the results." Tr. 29, 314-15. The ALJ also found Plaintiff's daily activities of watching television, reading, driving, preparing simple meals, and traveling outside of Oregon by car in October 2011 were inconsistent with her alleged limitations. Tr. 29.

The ALJ also found some of Plaintiff's alleged medical impairments were not medically determinable and not supported by

medical evidence or her treatment history. Tr. 25. For example, although Jim Shames, M.D., noted in September 2008 that Plaintiff "describes herself as having fibromyalgia" and Dr. Julyan "appears to have accepted [Plaintiff's] assertion of her condition [of fibromyalgia]," the record does not reflect any testing for fibromyalgia or any formal diagnosis of this condition by any treating or examining physician. Tr. 25, 375, 538. Moreover, although Plaintiff testified fibromyalgia was specifically affecting her legs, the ALJ noted the condition generally "affects patients globally." Tr. 25 (citing SSR 99-20 n.3).

The Court concludes on this record that the ALJ did not err when he rejected Plaintiff's testimony because he provided clear and convincing reasons for doing so.

II. Medical Opinion Evidence

An ALJ may reject an examining or treating physician's opinion when it is inconsistent with the opinions of other treating or examining physicians if the ALJ makes "findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record." *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002) (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)). When the medical opinion of an examining or treating physician is uncontroverted, however, the ALJ must give "clear and convincing reasons" for

rejecting it. *Thomas*, 278 F.3d at 957. See also *Lester v. Chater*, 81 F.3d 821, 830-32 (9th Cir. 1995). Generally the more consistent an opinion is with the record as a whole, the more weight an opinion should be given. 20 C.F.R. § 416.927(c) (4).

A nonexamining physician is one who neither examines nor treats the claimant. *Lester*, 81 F.3d at 830. "The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician." *Id.* at 831. When a nonexamining physician's opinion contradicts an examining physician's opinion and the ALJ gives greater weight to the nonexamining physician's opinion, the ALJ must articulate his reasons for doing so. See, e.g., *Morgan v. Comm'r of Soc. Sec. Admin*, 169 F.3d 595, 600-01 (9th Cir. 1999). A nonexamining physician's opinion can constitute substantial evidence if it is supported by other evidence in the record. *Id.* at 600.

Plaintiff contends the ALJ improperly rejected the opinion of treating physician Dr. Julyan. On August 9, 2011, Dr. Julyan completed a Physical Residual Functional Capacity Questionnaire regarding Plaintiff. In the questionnaire Dr. Julyan explained he has treated Plaintiff for three years and has seen her on a monthly basis. Tr. 538. He diagnosed Plaintiff with lumbar

radicular pain, cervical radicular pain, fibromyalgia, and an abnormal gait. Tr. 538. Dr. Julyan stated Plaintiff has moderate-to-severe pain in her spine, pelvis, and extremities on a daily basis. Tr. 538. Dr. Julyan also stated Plaintiff has a decreased range of motion in her neck, lower back, hips, and upper extremities and weakness in her upper left extremity. Tr. 538. Dr. Julyan opined Plaintiff also suffers from depression and anxiety and is incapable of tolerating even a "low stress" job due to the fact that Plaintiff experiences moderate-to-severe pain with light exertion. Tr. 539. Dr. Julyan opined Plaintiff is only able to sit or to stand for five minutes at a time before changing position, and in an eight-hour work day she can stand or walk for less than two hours and can sit for at least six hours. Tr. 540. Dr. Julyan stated Plaintiff would need to take five-to-ten minute breaks every hour during an eight-hour workday and would need a cane when standing or walking. Tr. 540. Dr. Julyan also opined Plaintiff is capable of lifting ten pounds rarely and is unable to tilt her head down or up, twist, stoop, crouch, or climb ladders. Tr. 541. He also stated Plaintiff has significant limitations with reaching or fingering and can only use her right hand eighty-percent of the time and her left hand ten-percent of the

time in an eight-hour workday. Tr. 541. Dr. Julyan stated he would expect Plaintiff to miss more than four days of work per month as a result of her impairments. Tr. 541.

The ALJ gave less weight to Dr. Julyan's opinion than the opinion of Sharon Eder, M.D., a Disability Determination Services⁵ medical consultant who opined Plaintiff was capable of light work with some postural limitations. Tr. 29, 300-07. The ALJ gave less weight to Dr. Julyan's opinion in part because Dr. Julyan relied on conditions that Plaintiff failed to establish as medically determinable such as fibromyalgia and cervical radicular pain and because Dr. Julyan relied heavily on the subjective complaints of Plaintiff, who the ALJ found was not entirely credible. Tr. 29. The ALJ also noted Dr. Julyan was "vague with respect to some findings" and noted some inconsistencies between Dr. Julyan's progress notes and his August 9, 2011, opinion. For example, Dr. Julyan stated in the August 9, 2011, questionnaire that Plaintiff has decreased range of motion in her extremities, but he noted in May 24, 2011, that Plaintiff had full range of motion. Tr. 493, 538. The ALJ also

⁵ Disability Determination Services (DDS) is a federally funded state agency that makes eligibility determinations on behalf and under the supervision of the Social Security Administration pursuant to 42 U.S.C. § 421(a).

found the treatment regimen prescribed by Dr. Julyan and other treating sources was not commensurate with Dr. Julyan's "rather extreme" opinion. For example, the ALJ found Dr. Julyan's opinion as to Plaintiff's physical limitations was not supported by other treating sources such as Dr. Altstadt, a neurological and orthopedics specialist. Dr. Altstadt performed Plaintiff's back surgery in May 2010 to remove a nerve sheath tumor.

Tr. 261-63. Dr. Altstadt's post-operative notes state Plaintiff was "doing well," her leg pain was significantly improved, the paresthesias she experienced was much less severe and frequent than before surgery, and Plaintiff was "quite happy with the results" of the operation. Tr. 314-15.

The Court concludes on this record that the ALJ did not err when he rejected Dr. Julyan's opinion because the ALJ provided legally sufficient reasons supported by the record for doing so.

III. The ALJ's hypothetical to the VE was complete.

Plaintiff contends the ALJ's hypothetical to the VE was inadequate because it did not contain all of Plaintiff's alleged limitations. The Court has already found the ALJ did not err when he found Plaintiff was not entirely credible regarding her limitations and when he discounted the opinion of Dr. Julyan.

Accordingly, on this record the Court concludes the ALJ's hypothetical to the VE was not inadequate.

CONCLUSION

For these reasons, the Court **AFFIRMS** the Commissioner's decision and **DISMISSES** this matter.

IT IS SO ORDERED.

DATED this 3rd day of June, 2014.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge